BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES STROME Claimant VS. **N. R. HAMM QUARRY** Respondent AND **U.S.F. & G. and CNA** Insurance Carriers AND **WORKERS COMPENSATION FUND**	Docket No. 162,253

ORDER

Claimant appeals from an Award entered by Administrative Law Judge George R. Robertson on June 10, 1994.

APPEARANCES

Claimant appeared by his attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carriers appeared by their attorneys, Mickey W. Mosier of Salina, Kansas, and John David Jurcyk of Lenexa, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Jeffrey E. King of Salina, Kansas.

RECORD

The Appeals Board has reviewed and considered the record listed in the Award.

STIPULATIONS

The Appeals Board notes some discrepancy between the stipulations listed in the Award and those stated by the parties in their respective submission letters. The parties, in fact, stipulated:

(1) The hearing may be held in Saline County.
(2) The relationship of employer and employee existed on those dates.

(3) The parties are covered by the Kansas Workers Compensation Act, which includes the occupational diseases under Article 5a.
(4) The coverage dates for U.S.F. & G. Company were from March 31, 1988 to March 31, 1990.
(5) The coverage for Continental National American Group (CNA) was from March 31, 1990 forward.

The Administrative Law Judge states in his Award that the parties stipulated the last injurious exposure was January of 1992 and the last injury to exposure took place in Dickinson County. Neither of these were listed as stipulations in the submission letters, or otherwise, in the record. Respondent CNA asserts that the last injurious exposure occurred during coverage by U.S.F. & G. On the other hand, U.S.F. & G. asserts that claimant suffered exposure in employment after claimant left work for respondent, specifically, in the course of his employment for Custom Metal Fabricators.

ISSUES

The Administrative Law Judge found claimant's asthmatic condition is not compensable. He found the condition failed to satisfy two of the requirements specified in K.S.A. 44-5a01(1). He found that the asthma was an ordinary disease of life; and he found that the claimant was not working in an employment to which there was attached a particular or peculiar hazard of the disease which distinguished it from other occupations and employments. Claimant asserts that the Administrative Law Judge erred in his findings on both those issues and, in addition, asks the Appeals Board to make findings and conclusions relating to average weekly wage and nature and extent of claimant's disability.

The Appeals Board notes that if the claim were considered to be compensable, there would remain additional issues not decided by the Administrative Law Judge. These would include:

(1) Whether claimant gave timely notice and, if not, whether respondent has established prejudice resulting from such failure.
(2) Whether claimant made timely written claim.
(3) Whether claimant is entitled to any additional temporary partial disability benefits.
(4) Whether claimant is entitled to reimbursement for medical expenses.
(5) Whether the Kansas Workers Compensation Fund is responsible for all or any part of the liability by either insurance carrier in this matter.
(6) The amount of compensation due, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds:

(1) The Appeals Board finds claimant has suffered a compensable occupational disease arising out of and in the course of his employment for the respondent. The Appeals Board first finds the claimant has suffered a type of asthma as a result of exposure to diisocyanate in the paint with which he worked in the course of employment with the respondent. Claimant, age 35 at the time of the regular hearing, started working for respondent in 1975. In approximately 1980 he began working in the shop. The work in the shop included welding and painting in a 60-by 100-foot room with no windows. The paint was sprayed and it included a special hardener, toluene diisocyanate. He painted

one to two days per week, ten hours each day. Working with the paint caused a burning sensation in his chest and sinuses which was initially relieved by going outside into the fresh air.

Three physicians testified regarding the nature and cause of claimant's condition. Dr. Koprivica testified that claimant suffered from a reactive airway disease, a type of asthma, which in his opinion was caused by exposure to diisocyanate at work. Dr. Drevets, an internist specializing in the field of allergies, treated claimant from August 1989 through June of 1991. He diagnosed bronchial asthma, which he testified was probably due to paint hardener, toluene diisocyanate, and the irritant effect from the welding and diesel fumes in the building where he worked. Dr. Hill, also an internist, testified the test results were consistent with an asthmatic process. He declined to state any opinion regarding the cause but acknowledged that the condition he found was consistent with asthma induced by exposure to diisocyanate. The record contains no convincing evidence of any other cause and the Appeals Board finds claimant's asthma was caused by diisocyanate at work.

The Appeals Board also finds claimant's employment involved a particular peculiar hazard that has distinguished it from other occupations or employment and created a hazard in excess of the hazard of the disease to the public in general. The Kansas Supreme Court's decision in Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984), illustrates what the Court has considered evidence of a special risk. In that case claimant sought benefits for emphysema allegedly attributable to exposure at work. The Court stated:

> "The first claim is that there was no substantial competent evidence that claimant was engaged in an occupation or employment which exposed him to a special risk. To the contrary, the claimant and three of his coemployees testified that there was a lot of painting going on where the claimant worked; that the air was sometimes foggy and so thick you could not see the other end of the department. The exhaust system was not adequate. There was testimony that polyurethane as well as enamel and lacquer paints and ketone thinners were being used. One of the employees testified that other employees in the same department have suffered some lung problems, and that OSHA had instructed the department to cut down the painting. Finally, a Cessna nurse testified that the company required annual physicals for employees who worked in areas that were considered most hazardous. Claimant was one of those required to take an annual physical examination. There was ample substantial and competent evidence to support the trial court's finding that claimant was engaged in an occupation or employment which exposed him to a special risk, a special and peculiar hazard of the disease from which the trial court found he suffers."

As summarized above, the evidence in this case shows claimant worked one or two days each week doing only painting. He worked ten hours each day. The room in which the painting was done had no windows and did not appear to be otherwise adequately ventilated. It was also established that the paint included a chemical which is considered to be a cause of asthma. The Appeals Board considers this to be an exposure which created a risk not common to employment in general and which is in excess of a hazard of such disease in general.

The Appeals Board also concludes, under the circumstances presented in this case, the asthma contracted by the claimant was not an ordinary disease of life. The provisions of K.S.A. 44-5a01, excludes from coverage of the Kansas Workers Compensation Act:

> "Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment . . . ."

The Kansas Appellate decisions contain no definition of ordinary diseases of life as used in the statute. The Appeals Board, however, understands the language to refer to commonly encountered diseases, such as the flu, which the general public is equally at risk of suffering, without regard to their employment. In this case, the employment created a unique risk. The Appeals Board finds, under these circumstances, the specific asthma condition suffered by claimant is not an ordinary disease of life.

(2) The Appeals Board also finds the evidence establishes as a matter of law, the date of accident in this case was January 31, 1992. Claimant worked through that date and the uncontradicted evidence establishes that he left his employment at that time because of the asthma and resulting symptoms. The doctors uniformly agreed that claimant should not work in an environment which exposed him to iisocyanates. The date of accident is, therefore, controlled by the analysis set forth in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). Respondent acknowledges that the last exposure in employment for respondent was January 31, 1992, but argues that the last injurious exposure was sometime several years earlier. This argument was based upon medical testimony indicating claimant's pulmonary function test did not worsen after 1989. The Appeals Board disagrees with respondent's argument for two reasons. First, the Berry, *supra*, decision does not tie the date of accident to the date of the last injurious exposure. The decision ties the date of accident to the last day worked if claimant left work due to a condition caused by repetitive trauma, in this case analogous, repetitive exposure. See Condon v. The Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995).

In addition, however, the Appeals Board considers the record to establish the claimant's symptoms worsened after 1989. Dr. Drevets testified that the condition could worsen into scarring if the exposure continued. The condition is described as one that left the pulmonary function unimpaired as long as the claimant is not exposed to certain chemicals. When he is not exposed to those chemicals the pulmonary functions are normal, and in that sense his pulmonary functions did not worsen after 1987. However, the evidence does establish his reaction to chemicals worsened. This reaction to chemicals is part of the disability from which he now suffers. The worsening appears to have continued until, approximately, the time he left his employment with respondent.

Respondent also asserts that there is evidence of exposure subsequent to his employment with Custom Metal Fabricators. The evidence does show exposure to paint in subsequent employment which also caused symptoms. Claimant, in fact, left his employment at Custom Metal Fabricators because of his reaction to the paint. Based upon that evidence, respondent asserts the liability should be imposed solely upon Custom Metal Fabricators, not on N. R. Hamm Quarry. The Appeals Board disagrees. The evidence in this case established that the condition arose and was caused by exposure in the course of employment for the respondent. Claimant left his employment with respondent because of that condition. The fact that he attempted subsequent work, which reactivated the symptoms, does not shift liability where there is no evidence claimant suffered any permanent worsening of his condition from his employment with Custom Metal Fabricators. The Appeals Board considers the rule set forth in Berry, *supra*, to establish the date of accident for a single employer, not between employers.

The finding that the date of claimant's accident was January 31, 1992, effectively resolves the dispute regarding timely written claim and notice. Claimant had made written claim on January 28, 1990 by certified mail. Respondent, thereafter, paid medical and temporary total disability benefits through November 29, 1992. Claimant's notice and written claim were, therefore, timely. See K.S.A. 44-520.

As a result of the above individual findings, the Appeals Board finds claimant's claim to be compensable. There remain, however, factual disputes relating to the nature and extent of claimant's disability, average weekly wage, future medical benefit, liability of the

Kansas Workers Compensation Fund and entitlement to temporary partial benefits. Because he found the claim not compensable, the Administrative Law Judge made no findings regarding these issues. The Appeals Board, therefore, remands this case to the Administrative Law Judge for findings on all other issues.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson dated June 10, 1994 should be, and the same is hereby, reversed and remanded to the Administrative Law Judge to make findings regarding nature and extent of claimant's disability, average weekly wage, entitlement to temporary partial benefits, amount of benefits due and whether the Kansas Workers Compensation Fund is liable for any or all benefits to be paid. The rulings should also include whether the deposition of Kim Strome has been considered.

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, Kansas
Mickey W. Mosier, Salina, Kansas
John David Jurcyk, Lenexa, Kansas
George R. Robertson, Administrative Law Judge
Philip S. Harness, Director